Ong Thean Chye & Ors v Tiew Choy Chai & Anor

A

COURT OF APEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–1772 OF 2009

B

ABDUL MALIK ISHAK, KANG HWEE GEE AND ABDUL WAHAB PATAIL JJCA

6 SEPTEMBER 2010

C

Civil Procedure — Locus standi — Illegal agreements — Whether parties under an illegal agreement have locus standi to sue on such agreement

Contract — Illegality — Agreement — Illegal or sham agreements — Stamping of illegal agreements — Whether stamping of illegal agreements rendered agreements legal and enforceable — Contracts Act 1950 s 24(a) & (b)

D

Contract — Illegality — Agreement — Illegal or sham agreements — Whether enforceable — Agreement for payment of brokerage commission to persons not registered under Valuers, Appraisers and Estate Agents Act 1981 — Whether agreement enforceable — Valuers, Appraisers and Estate Agents Act 1981 s 22C(1)(d) — Contracts Act 1950 s 24(a) & (b)

E

F

Contract — Privity — Privity of contract — Claim made against persons not party to contract — Whether claim frivolous

G

Contract — Sale and purchase of land — Agreement — Payment of brokerage commission — Agreement for payment of brokerage commission to persons not registered under Valuers, Appraisers and Estate Agents Act 1981 — Whether agreement enforceable — Valuers, Appraisers and Estate Agents Act 1981 s 22C(1)(d) — Contracts Act 1950 s 24(a) & (b)

H

Professions — Valuers — Valuers, appraisers and estate agents — Professional fees — Agreement for payment of brokerage commission to persons not registered under Valuers, Appraisers and Estate Agents Act 1981 — Whether agreement enforceable — Valuers, Appraisers and Estate Agents Act 1981 s 22C(1)(d) — Contracts Act 1950 s 24(a) & (b)

I

The third appellant as the purchaser entered into a sale and purchase agreement ('the said agreement') with several vendors ('the vendors') to purchase several

parcels of land ('the said lands'). The purchase price was listed at RM3,883,645. Prior to the execution of the said agreement, the third appellant and the respondents executed a document ('the said document') wherein the third appellant agreed to pay the respondents a sum of RM3,106,876 being the respondents' 'professional fees and charges for negotiating and securing', on behalf of the third appellant, the said lands at the agreed price of RM3,883,645. The third appellant, pursuant to the said document, paid a total sum of RM621,375.20 to the respondents. The respondents filed a civil suit against the appellants claiming the sum of RM2,485,500.80 being the balance under the said document. The appellants claimed that the respondents were not licensed nor were they real estate agents under the Valuers, Appraisers and Estate Agents Act 1981 ('the Act'). The High Court gave judgment in favour of the respondents. Aggrieved by that decision, the appellants filed this appeal. The appellants advanced four main defences, namely: (a) that the respondents had no cause of action against the first and second appellants; (b) that the respondents' claim contravened the Act particularly s 22C thereto and, consequently was illegal pursuant to s 24 of the Contracts Act 1950; (c) that the said document was a sham document and/or a sham agreement; and (d) that the respondents had no locus standi.

Held, allowing the appeal with costs:

(1) The said document was issued only by the third appellant. The first appellant and the second appellant were not parties to the said document. There was no privity of contract between both the respondents and the first and second appellants. Hence, the respondents had no cause of action against both the first and second appellants. The respondents' claim against them was obviously frivolous (see paras 13–15).

(2) The said document referred to professional land brokerage or an estate agent's fees. The words 'professional fees and charges' were used as a sham to avoid allegations of under-counter payment. The said document showed that both the respondents were in the business of land brokerage or real estate agency and that the amount claimed by both the respondents were in relation to that business. Since both the respondents are not registered agents, any claim by them based on or pursuant to the said document was in violation of s 22C(1)(d) of the Act (see paras 19, 20 & 31).

(3) A single isolated act may amount to an estate agency practice if evidence of system is established. The evidence of system as demonstrated clearly showed that the respondents were running an estate agency practice without a valid authority to practice under the Act (see paras 32 & 35).

(4) The said document was a sham document. The sum of RM3,106,876 was actually part of the sale and purchase price payable to the vendors. It was 'under counter money', so to speak, that the respondents were

supposed to pay to the vendors but which the respondents were now claiming as their own. The court is not expected to support an improper commercial arrangement (see para 40).

(5) The mere act of stamping does not change the character of any document or agreement. An illegal document or agreement will remain illegal despite it being stamped (see para 65).

(6) The courts will not enforce contracts which are tainted with illegality. Courts too will not lend its aid to enforce pretended obligations. Only real obligations will be enforced. As a sham document it was entirely unenforceable. There was no basis for the respondents to claim 'professional fees and charges' of any kind whatsoever. Further, as a sham document, the respondents have no locus standi to seek the prayers they sought for in their statement of claim (see paras 68, 73 & 74).

Obiter:

Incorporation of a company casts a veil over the true persons who control the company. The law will not permit the veil to be penetrated except in exceptional situations. Generally speaking, the courts will respect the company's integrity and will decline to lift the veil of incorporation. The only justification for lifting the veil of incorporation would be where the company is not a separate entity (see paras 78–79).

[Bahasa Malaysia summary

Perayu ketiga sebagai pembeli telah memasuki perjanjian jual beli ('perjanjian tersebut') bersama beberapa penjual ('penjual tersebut') untuk membeli beberapa bidang tanah ('tanah-tanah tersebut'). Harga belian disenaraikan pada RM3,883,645. Sebelum memasuki perjanjian itu, perayu ketiga dan responden-responden telah menyempurnakan dokumen ('dokumen tersebut') di mana perayu ketiga bersetuju untuk membayar responden-responden sejumlah RM3,106,876 yang merupakan 'professional fees and charges for negotiating and securing' responden, bagi pihak perayu ketiga, tanah-tanah tersebut pada harga yang dipersetujui RM3,883,645. Perayu ketiga, menurut dokumen tersebut, telah membyar sejumlah RM621,375.20 kepada responden-responden. Responden-responden telah memfailkan guaman sivil terhadap perayu-perayu menuntut jumlah RM2,485,500.80 iaitu baki di bawah dokumen tersebut. Perayu-perayu mendakwa bahawa responden-responden tidak mempunyai lesen dan bukan ejen hartanah mereka di bawah Akta Penilai, Pentaksir dan Ejen Harta Tanah 1981 ('Akta tersebut'). Mahkamah Tinggi telah memberi penghakiman yang berpihak kepada responden-responden. Berasa terkilan oleh keputusan tersebut, perayu-perayu telah memfailkan rayuan ini. Perayu-perayu telah mengemukakan empat pembelaan utama, iaitu: (a) responden-responden tiada kausa tindakan terhadap perayu-perayu pertama dan kedua; (b) bahawa tuntutan responden-responden bertentangan dengan Akta tersebut khususnya s 22C dan akibat daripada itu menyalahi undang-undang menurut s 24 Akta Kontrak

1950; (c) bahawa dokumen tersebut adalah dokumen palsu dan/atau perjanjian palsu; dan (d) bahawa responden-responden tiada locus standi.

Diputuskan, membenarkan rayuan dengan kos:

(1) Dokumen tersebut telah dikeluarkan oleh perayu ketiga. Perayu ketiga dan perayu kedua bukan pihak-pihak kepada dokumen tersebut. Tiada priviti kontrak antara kedua-dua responden dan perayu-perayu pertama dan kedua. Justeru itu, responden-responden tiada kausa tindakan terhadap kedua-dua perayu pertama dan kedua. Tuntutan responden-responden terhadap mereka jelas remeh (lihat perenggan 13–15).

(2) Dokumen tersebut merujuk kepada yuran broker tanah atau ejen hartanah. Perkataan-perkataan 'professional fees and charges' digunakan sebagai penipuan untuk mengelakkan tuduhan duit kopi. Dokumen tersebut menunjukkan bahawa kedua-dua responden dalam perniagaan broker tanah atau agensi hartanah dan jumlah yang dituntut oleh kedua-dua responden adalah berkaitan perniagaan tersebut. Oleh kerana kedua-dua repsonden bukan ejen berdaftar, apa-apa tuntutan oleh mereka berdasarkan atau menurut dokumen tersebut merupakan pelanggaran s 22C(1)(d) Akta tersebut (lihat perenggan 19, 20 & 31).

(3) Satu tindakan terpencil boleh membentuk urusan agensi hartanah jika keterangan sistem dibuktikan. Keterangan sistem sepertimana ditunjukkan jelas membuktikan bahawa responden-responden menjalankan urusan agensi hartanah tanpa kuasa sah untuk beramal di bawah Akta tersebut (lihat perenggan 32 & 35).

(4) Dokumen tersebut satu dokumen palsu. Jumlah RM3,106,876 itu adalah sebenarnya sebahagian daripada harga jual beli yang perlu dibayar kepada penjual. Ia merupakan 'under counter money', yang dikatakan, sepatutnya dibayar oleh responden-responden kepada penjual-penjual tetapi yang sekarang ini responden-responden mendakwa adalah milik mereka. Mahkamah tidak wajar memihak kepada urusan komersial yang tidak wajar sebegini (lihat perenggan 40).

(5) Tindakan mematikan setem tidak mengubah sifat apa-apa dokumen atau perjanjian. Dokumen atau perjanjian yang menyalahi undang-undang tetapi menyalahi undang-undang meskipun ia dimatikan setem (lihat perenggan 65).

(6) Mahkamah tidak akan menguatkuasakan kontrak yang dicemari dengan kepenyalahan undang-undang. Mahkamah juga tidak akan membantu untuk menguatkuasakan tanggungjawab sepertimana yang didakwa. Hanya tanggungjawab sebenar akan dikuatkuasakan. Suatu dokumen palsu tidak boleh dikuatkuasakan. Tiada asas untuk responden-responden menuntut 'professional fees and charges' dalam

apa bentuk sekalipun. Bahkan, disebabkan dokumen palsu itu, responden-responden tiada locus standi untuk membuat permohonan sepertimana dalam penyataan tuntutan mereka (lihat perenggan 68, 73 & 74).

Obiter:

Pemerbadanan syarikat meletak tabir ke atas mereka yang sebenarnya mengawal syaikat. Undang-undang tidak membenarkan tabir itu ditembusi kecuali dalam keadaan luar biasa. Pada amya, mahkamah menghormati integriti syarikat dan tidak mengetepikan tabir pemerbadanan. Satu-satunya justifikasi untuk mengetepikan tabir pemerbadanan adalah jika syarikat itu bukan entiti berasingan (lihat perenggan 78–79).]

Notes

For a case on privity of contract, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 4745.

For cases on agreement, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4901–4905.

For cases on locus standi in general, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5187–5269.

For cases on illegality of agreements, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4206–4209.

For cases on valuers in general, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1809–1815.

Cases referred to

ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia Bhd [2001] 3 MLJ 641, HC (refd)

Benjamin Developments Ltd v Robt Jones (Pacific) Ltd [1994] 3 [NZLR] 189, CA (refd)

Brilliant Team Management Sdn Bhd v South East Pahang Oil Palm Sdn Bhd & Ors [2007] 1 MLJ 536, HC (refd)

Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409, SC (refd)

Deutsche Genossenschaftsbank v Burnhope and others [1995] 4 All ER 717, HL (refd)

Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847, HL (refd)

Equitable Life Assurance Society v Hyman [2000] 3 All ER 961 (refd)

Kirin-Amgen Inc v Hoechst Marion Roussel Ltd [2005] RPC 169 (refd)

Lee Pooi Chun v Lee Kah Gee [1971] 2 MLJ 67, FC (refd)

Letang v Cooper [1965] 1 QB 222; [1964] 2 All ER 929, CA (refd)

Lim Kean v Choo Koon [1970] 1 MLJ 158 (refd)

Matad Sdn Bhd v Ng Chee Keong [2004] 2 CLJ 99, CA (refd)

Nasri v Mesah [1971] 1 MLJ 32, FC (refd)

Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474, SC (refd)

Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451 (refd)

Palaniappa Chettiar v Arunasalam Chettiar [1962] MLJ 143, PC (refd)

A *Pemungut Duti Setem v BASF Services (Malaysia) Sdn Bhd* [2009] 5 MLJ 348; [2010] 4 CLJ 556, CA (refd)
S Manickam & Ors v Ismail bin Mohamad & Ors [1997] 2 MLJ 90, HC (refd)
Sabahbumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151, FC (refd)
B *Saunders v Edwards* [1987] 2 All ER 651, CA (refd)
Saw Gaik Beow v Cheong Yew Weng & Ors [1989] 3 MLJ 301, HC (refd)
Sirius International Insurance Co (Publ) v FAI General Insurance Ltd & Ors [2004] 1 WLR 3251, HL (refd)
C *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257, FC (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)
Zeus Tradition Marine Ltd v Bell (The 'Zeus V') [1999] 1 Lloyd's LR 703 (refd)

D **Legislation referred to**
Contracts Act 1950 s 24, 24(a), (b)
Valuers, Appraisers and Estate Agents Act 1981 ss 2, 22C, 22C(1)(c), (1)(d)
Valuers, Appraisers and Estate Agents Rules 1986 r 48

E **Appeal from**: Civil Suit No 22–457 of 2005 (MT1) (High Court, Pulau Pinang)

M Thayalan (Thayalan & Associates) for the appellants.
Darshan Singh (Darshan Singh & Co) for the respondents.

F **Abdul Malik Ishak JCA (delivering judgment of the court):**

THE FACTS

G **[1]** On 18 May 2004, the third appellant ('TMI Ventures (M) Sdn Bhd') as the purchaser entered into a sale and purchase agreement ('the said agreement') with several vendors ('the vendors') to purchase parcels of land identified as Lot No 289, Lot No 290, Lot No 291 and Lot No 752. All these lots were located at Mukim 11, Daerah Barat Daya, Penang ('the said lands'). The said
H agreement can be seen at pp 320–334 and at pp 311–316 of the appeal record at *Jilid* 2(3). And at p 330 of the appeal record at *Jilid* 2(3), the purchase price was listed at RM3,883,645.

[2] On 12 May 2004, prior to the execution of the said agreement, the third
I appellant and the respondents (Tiew Choy Chai (first respondent) and Khor Teik Khoon (second respondent)) executed a document ('the said document') wherein the third appellant agreed to pay the respondents a total sum of RM3,106,876 being the respondents' 'professional fees and charges for negotiating and securing', on behalf of the third appellant, the said lands at the

agreed price of RM3,883,645 subject to the terms and conditions stated therein. The said document can be seen at p 27 of the appeal record at *Jilid* 1 and it was worded as follows:

TMI VENTURES (M) SDN. BHD. (Co. No: 599269-M) Unit 1-3-3, No. 1 Jalan P Ramlee, 10460 Penang.

To:

(1) Mr. Tiew Choy Chai (NRIC: No: 520430–02–5347) No: 12-B, Taman Berjaya 08000 Sungai Petani, Kedah.

(2) Mr. Khor Teik Khoon (NRIC: No: 430113–07–5149) No: 23, Lorong Macang 5, Taman Machang Manis, 104000 Bukit Mertajam.

Re: Purchase of all that 4 pieces of land known as Lot Nos: 289, 290, 291 & 752 Mukim 11, South West District, Penang held under GM390, 391, 392 & 436 respectively totalling 17,831 acres.

We, the undersigned hereby confirm, agree and undertake to pay both of you a total sum of Ringgit Malaysia Three Million One Hundred and Six Thousand Eight Hundred and Seventy Six (RM3,106,876.00) only (hereinafter referred to as 'the said consideration') being your professional fees and charges for negotiating and securing on our behalf the lands abovementioned at the agreed sale price of Ringgit Malaysia Three Million Eight Hundred Eighty Three Thousand Six Hundred and Forty Five (RM3,883,645.00) only in the following manner subject to the following terms and conditions:–

(1) This agreement and undertaking to pay you the said consideration shall only be valid upon a formal and valid Sale and Purchase Agreement (hereinafter referred to as 'the said Sale and Purchase Agreement') being entered and executed between us and all the Owners of the said lands and the said lands could be transferred and registered into our names or our nominee(s). In the event that the sale or purchase is aborted, called off, terminated, rescinded or does not materialise or the Transfer could not be effected for any reasons whatsoever you shall not be entitled to the said consideration at all and you shall refund to us the said consideration or whatsoever sum or part thereof paid to you.

(2) The said consideration will be paid out to you accordingly in the following manner:–

   (a) 10% upon the execution of the said Sale and Purchase Agreement between the Vendors (owners of the lands) and us;

   (b) a further 10% within four (4) months from the date of the said Sale and Purchase Agreement; and

   (c) the balance 80% within nine (9) months from the date of the said Sale and Purchase Agreement or three (3) months from the date of extraction of the Grant of Probate in respect of the Estate of Chan Fook Chin, Deceased whichever is the later with an automatic extension of three (3) months subject to us paying interest at the rate of 8% per annum on the balance remaining unpaid.

Dated 12th day May 2004.

Yours faithfully,

Sgd. Illegible

TMI VENTURES (M) SDN. BHD. (Co.No: 599269-M)

Director	Authorised Signatory	
We confirm the above,		
Sgd. Illegible	Sgd. Illegible	.....
Tiew Choy Chai	Khor Teik Khoon	Name:.

[3] It is pertinent to note that the schedule of payment under the said agreement is exactly the same as the schedule for payment under the said document (see p 27 of the appeal record at *Jilid* 1 and at p 330 of the appeal record at *Jilid* 2(3)).

[4] The third appellant, pursuant to the said document, paid a total sum of RM621,375.20 to the respondents.

[5] The respondents filed a civil suit in the High Court against the appellants claiming the sum of RM2,796,188.40 purportedly being the balance under the said document.

[6] Later, in the course of their submissions, the respondents amended their claim to RM2,485,500.80.

[7] The appellants averred in their statement of defence that the respondents were not licensed nor were they real estate agents under the Valuers, Appraisers and Estate Agents Act 1981.

[8] After a trial, the High Court gave judgment in favour of the respondents for the sum of RM2,485,500.80 together with interest and costs. Aggrieved by that decision, the appellants filed an appeal to this court.

ANALYSIS

[9] The respondents' claim hinged on the said document dated 12 May 2004. But the respondents were unsure as to what exactly they were claiming for. The respondents have not described the nature of their claim in their statement of claim. Salient words like 'professional fees and charges' and/or 'commission' were not employed in the statement of claim.

[10] In the respondents' 'Ringkasan Kes Plaintif-plaintif' dated 20 July 2009 particularly at para 1 thereto, the respondents' averred that 'plaintif-plaintif menuntut baki komisyen di bawah Perjanjian bertarikh 12.5.2004'. And in the respondents' submissions before the Federal Court vide Federal Court Civil Application No 08–162 of 2009, the respondents averred that they were claiming for the 'baki wang … sebagai komisen'.

[11] The parties are certainly bound by their pleadings. The court is not entitled to decide a suit on a matter which is not pleaded and, consequently, the trial of the suit is confined to the pleadings (*Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 at p 154). Pleadings serve to define and delimit with clarity and precision the real matters in controversy between the parties (*S Manickam & Ors v Ismail bin Mohamad & Ors* [1997] 2 MLJ 90).

[12] The appellants advanced four main defences, namely:

(a) that the respondents have no cause of action against the first appellant (Ong Thean Chye) and the second appellant (Loh Kim Luan);

(b) that the respondents' claim based on the said document dated 12 May 2004 contravened the Valuers, Appraisers and Estate Agents Act 1981 particularly s 22C thereto and, consequently, illegal pursuant to s 24 of the Contracts Act 1950;

(c) that the said document is a sham document and/or a sham agreement; and

(d) that the respondents have no locus standi.

NO CAUSE OF ACTION AGAINST THE FIRST APPELANT (ONG THEAN CHYE) AND THE SECOND APPELANT (LOH KIM LUAN)

[13] The said document dated 12 May 2004 was issued only by the third appellant. The first appellant and the second appellant were not parties to the said document. There was no privity of contract between both the respondents and the first and second appellants. The doctrine of privity of contract states that a person may not enforce a contractual promise and obtain remedies for its breach, even when the promise was expressly made for that person's benefit, if he is not a party to the contract. Thus, persons who are not a party to a contract may not have their rights diminished by that contract.

[14] The appellants in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, had sold tyres to a distributor on terms that the distributor would not resell them at a price lower than the appellants' list price, and on terms that if sold to a trade buyer the distributor would obtain a similar undertaking from that buyer. The distributor resold some tyres to the

respondents who gave the required undertaking agreeing to pay £5 liquidated damages to the appellants for each tyre sold in breach of that undertaking. The respondents sold tyres below the list price, and the appellants sued to recover the agreed damages. Viscount Haldane LC aptly said at p 853:

> My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request.

[15] Now, it must be borne in mind that both the first and second appellants have not given any letters or made any promises in their personal capacity. In our judgment, the respondents have no cause of action against both the first and second appellants. The respondents' claim against them was obviously frivolous. According to Lord Diplock LJ in *Letang v Cooper* [1965] 1 QB 222 at p 242; [1964] 2 All ER 929 at p 934, the words 'cause of action' have been defined to mean 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person'. This very definition received judicial acceptance in the following cases:

(a) *Lim Kean v Choo Koon* [1970] 1 MLJ 158;

(b) *Nasri v Mesah* [1971] 1 MLJ 32;

(c) *Saw Gaik Beow v Cheong Yew Weng & Ors* [1989] 3 MLJ 301;

(d) *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474, (SC); and

(e) *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409, (SC).

[16] Be that as it may, the respondents have not pleaded the existence of any agreement or document to render the first and the second appellants personally liable.

CONTRAVENTION OF THE VALUERS, APPRAISERS AND ESTATE AGENTS ACT 1981

[17] The said document dated 12 May 2004 employed the words 'professional fees and charges' in describing the relationship between both the respondents and the third appellant. Usage of the words 'professional fees and charges' connote a system of practice and it cannot be a one-off transaction as claimed by the respondents.

[18] The *Concise Oxford Dictionary of Current English*, (8th Ed) defines 'professional' in this way:

> of or belonging to or connected with a profession, having or showing the skill of a professional, competent, worthy of a professional (professional conduct), engaged in a specified activity as one's main paid occupation.

[19] It is our judgment that the said document refers to professional land brokerage or an estate agent's fees. The words 'professional fees and charges' were used as a sham to avoid allegations of under-counter payment.

[20] The said document showed that both the respondents were in the business of land brokerage or real estate agency and that the amount claimed by both the respondents were in relation to that business. The words 'professional fees and charges for negiotiating and securing' appearing in the said document must necessarily refer to the sale of the landed properties between the vendor and the purchaser at an agreed price and this in turn must of necessity refer to the estate agent's fees or the brokerage commission.

[21] Lord Steyn aptly said in *Equitable Life Assurance Society v Hyman* [2000] 3 All ER 961, at p 970 that:

> The purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear.

[22] And Colman J in *Zeus Tradition Marine Ltd v Bell (The 'Zeus V')* [1999] 1 Lloyd's LR 703, at p 706 said that:

> References to the meaning which would be conveyed to a 'reasonable person' (see Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at p 912) are merely another and familiar way of expressing the judicial process of inference from admissible primary evidence.

[23] Pure and simple, interpretation involves the ascertainment of the meaning to which a document would convey to a reasonable person who has all the background knowledge about the situation surrounding the formation of the contract.

[24] The objective nature of interpretation has been repeatedly stressed by Lord Steyn in *Deutsche Genossenschaftsbank v Burnhope and others* [1995] 4 All ER 717 (HL) as well as in *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd & Ors* [2004] 1 WLR 3251. And in the latter case at p 3257, Lord Steyn aptly said:

> The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual sense.

[25] Even Lord Hoffman in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] RPC 169, 185 emphasised that construction of a document is an objective exercise and this was what he said:

> Construction is objective in the sense that it is concerned with what a reasonable person to whom the utterance was addressed would have understood the author to be using the words to mean.

[26] The objective approach was also adopted in Australia and in New Zealand. In Australia, in the case of *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451. In New Zealand, in the case of *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189, (CA).

[27] With these broad legal principles in mind, we will now examine the evidence.

[28] Tan Hiang Joo (DW2) in re-examination categorically confirmed that the wordings in the said document refer to brokerage. At p 115 of the appeal record at *Jilid* 2(1), the notes of evidence during the re-examination of Tan Hiang Joo (DW2) carried the following exchange:

> Q2: When 3rd defendant made these payments what did the first defendant tell you these payments were for?
>
> A: He told me the payments were extra payments for the purchase.

[29] Section 2 of the Valuers, Appraisers and Estate Agents Act 1981 defines the words 'estate agency practice' to mean 'acting or holding oneself out to the public as ready to act, for a commission, fee, reward or other consideration, as an agent in respect of the sale or other disposal of land and buildings and of any interest therein or the purchase or other acquisition of land and buildings and of any interest therein or in respect of the leasing or letting of land and buildings and of any interest therein'.

[30] Sections 22C(1)(c) and 22C(1)(d) of the Valuers, Appraisers and Estate Agents Act 1981 restrict an estate agency practice. It states as follows:

22C Restrictions on estate agency practice

(1) No person shall unless he is a registered estate agent and has been issued with an authority to practise under section 16 —

(c) undertake any of the work specified in section 22B; or

(d) be entitled to recover in any court any fees, charges or remuneration for any professional advice or services rendered as an estate agent.

[31] Now, since both the respondents are not registered agents, any claim by them based on or pursuant to the said document must be held to be in clear violation of s 22C(1)(d) of the Valuers, Appraisers and Estate Agents Act 1981.

[32] It is our judgment that a single isolated act may amount to an estate agency practice if evidence of system is established. In *Matad Sdn Bhd v Ng Chee Keong* [2004] 2 CLJ 99, Gopal Sri Ram JCA (later FCJ) speaking for this court had this to say at p 107 of the report:

> It is we think appropriate at this stage to mention two conflicting decisions of the High Court, on the interpretation of the Act. In *Teh Swee Lian v Teh Eng Peng* [1998] 1 CLJ Supp 504, Azhar Maah J correctly held, on the facts before him that an isolated act did not constitute a holding out by the plaintiff and that evidence of system was necessary to prove estate agency practice. On the other hand, in *Lim Eng Heng v Lim Sam Keow* [2003] 6 CLJ 1, Su Geok Yiam JC appears to have held on the facts before her that an isolated transaction fell within the terms of the Act so that the plaintiff's claim in that case was tainted with illegality. We would agree that what appears to be an isolated act may amount to estate agency practice if evidence of a system of such acts is established to the satisfaction of the court. This is what happened in *Shamsudin v Vijeyacone*. But if by her judgment the judicial commissioner meant to say that as a matter of law an isolated transaction would fall within s 22C, then we respectfully say that that case was wrongly decided.

[33] Low Hop Bing J (now JCA) in *Brilliant Team Management Sdn Bhd v South East Pahang Oil Palm Sdn Bhd & Ors* [2007] 1 MLJ 536, at p 551, neatly summarised the principles of law in *Matad Sdn Bhd v Ng Chee Keong* laid down by Gopal Sri Ram JCA (later FCJ) in these salient words:

(1) the Act did not define 'estate agent' but instead defines 'estate agency practice' and focused the discovery of Parliamentary intention by referring to s 22C which provides for restrictions on estate agency practice;

(2) the word 'acting' in s 2 must be read contextually ie, in the context of s 22C which contemplates someone who 'practises' or who may 'carry on business' as 'an estate agent', as in s 22C(1)(a) and (aa);

(3) special notice should also be taken of the use of the word 'practise' in the opening words of s 22C(1), which requires some system, a course of conduct, but not an isolated act;

(4) s 22C must be given a contextual interpretation, based on the language employed by the section itself;

(5) in *Teh Swee Lian*, Azhar Maah J had correctly held on the facts before him, that an isolated act did not constitute holding out by the plaintiff and that evidence of system was necessary to prove estate agency practice; and

(6) in *Lim Eng Heng*, Su Geok Yiam JC (now J) following Appadurai appears to have held on the facts before her that an isolated transaction fell within the terms of the Act so that the plaintiff's claim in that case was tainted with illegality, and added that if by her judgment she meant to say that as a matter of law, an isolated transaction would fall within s 22C, then the Court of Appeal respectfully said that that case was wrongly decided, although the Court of Appeal did agree that what appeared to be an isolated act may amount to estate agency practice if evidence of a system of such acts is established to the satisfaction of the court.

[34] The relevant evidence to show system must now be regurgitated:

(a) the agreed facts at paras 3 and 7 of pp 49 and 50 of the appeal record at *Jilid* 1 stated as follows (in its original Malay language text):

> 3. Plaintif-plaintif berjaya untuk berunding dan mengaturkan tuanpunya-tuanpunya tanah tersebut untuk menjual tanah tersebut kepada Defendan Ke-3 dan Defendan Ke-3 telah menandatangani suatu perjanjian Jual Beli bertarikh 18 Mei 2004 untuk membeli tanah tersebut dengan harga RM3,883,645.
>
> 7. Plaintif-plaintif tidak mempunyai lesen agensi harta-tanah di bawah Akta Penilai, Pentaksir dan Ejen Harta-Tanah 1981.

(b) the evidence of the first appellant (DW1) by way of his witness statement as seen at pp 220–223 of the appeal record at *Jilid* 2(2) deserved repetition:

> 4.Q:Refer to Agreed Bundle (Part II) pages 11–12 and 2–7. This is the sale and purchase agreement dated 18.5.2004 between several vendors and the 3rd Defendant as purchaser for the purchase of 4 lots of land known as Lot Nos 289, 290, 291 and 752, Mukim 11, Daerah Barat Daya, Penang held under GM Nos 390, 391, 392 and 436 respectively (hereinafter collectively referred to as 'the said lands'). Can you explain how this purchase came about?
>
> A: Initially the said lands were being proposed to be sold to a company known as Dynamic Home Pro Sdn Bhd (hereinafter referred to as 'DHPSB'). DHPSB was incorporated to be involved in housing development. A company search of DHPSB is at Agreed Bundle (Part 1) pages 13–18. In early 2004, DHSP was looking for land in Penang, preferably on the island, to undertake some housing development. Several people were approaching DHPSB and introducing lands to be sold to DHPSB. The Plaintiffs in the present action were among those who approached DHPSB.

5.Q: How do you know about the affairs of DHPSB?

A: At the time DHPSB was looking for land for housing development, I was the General Manager of DHPSB. I joined DHPSB around February 2004.

6.Q: What do you know about matters pertaining to the lands introduced by the Plaintiffs to DHPSB?

A: I know that the Plaintiffs introduced several different lands to DHPSB. Some of the lands were on the island and some were on the mainland. With regard to lands on the island, the plaintiffs introduced lands at Sungai Ara, Balik Pulau and Sungai Batu. The Sungai Batu lands are the said lands referred to in paragraph 4 above.

7.Q: What was the role of the Plaintiffs in introducing the lands to DHPSB?

A: The Paintiffs said they were land brokers. They said they had in the past worked together in closing several land deals. They said they will look for lands that suit DHPSB's proposed housing project and then handle the negotiations with the vendor(s) until the material terms are agreed between the parties. The 2nd plaintiff claimed that he was an expert in land brokerage matters.

8.Q: What happened to the dealings between the Plaintiffs and DHPSB?

A: Out of the several lands introduced by the Plaintiffs, DHPSB was interested in 2 particular lands, ie. the said lands and the Sungai Ara lands.

9.Q: Can you explain what happened with regard to the Sungai Ara lands?

A: I refer to Agreed Bundle (Part 1) pages 3-5. At page 3 is DHPSB's payment voucher to the 2nd Plaintiff. It is dated 21 April 2004. DHPSB paid the 2nd plaintiff RM900.00 for him to obtain an option from the landowner of the Sungai Ara lands, i.e. Lots 697, 634 and 635, Mukim 10, South West District, Penang. This payment was to the 2nd Plaintiff personally.

10.Q: Does your signature appear on Agreed Bundle (Part 1) page 3?

A: Yes, it is under 'checked by' and 'cheque signatories'.

11.Q: Why was it necessary to pay the option fees?

A: It was paid based on the 2nd Plaintiff's advice. He advised that if there was an option, the landowners cannot sell the lands to other people. He said it was part of his practice to secure land deals.

12.Q: What happened to the proposal on the Sungai Ara lands?

A: In view of the fact that the lands were hilly, a topographical survey had to be undertaken. The survey was done by Jurukur Alam. The 2nd Plaintiff worked for Jurukur Alam – see Agreed Bundle (Part II) page 1. The relevant invoice and payment voucher for the survey fees are at Agreed Bundle (Part 1) pages 4 and 5. DHPSB paid the fees to Jurukur Alam.

13.Q: What happened to the proposal on the said lands?

A: While the topographical survey was being done on the Sungai Ara lands, the Plaintiffs were urging DHPSB to quickly decide on the purchase of the said lands. The second plaintiff said there were other potential buyers interested in the said lands and as such, a quick decision has to be made. Further, the plaintiffs said that they had spent a lot of time convincing the several vendors to sell the said lands and if there was delay, the vendors might change their minds. They said some of the vendors were not that keen to sell so any delay might jeopardize the transaction. The problem was DHPSB did not have immediate funds to commit itself to the purchase of the said lands. At the same time, the Plaintiffs were advising DHPSB that the said lands were suitable for DHPSB's development project. As the 2nd plaintiff worked for Jurukur Alam, DHPSB believed the 2nd plaintiff that the said lands were suitable. DHPSB was convinced by the plaintiffs and DHPSB agreed to buy the said lands.

14.Q: How was the purchase of the lands by DHPSB done?

A: As the 3rd Defendant had available funds, it was decided that the said lands be purchased by the 3rd Defendant and the 3rd Defendant would then sell the said lands to DHPSB for a profit. This would give DHPSB time to look for funds. The third defendant agreed to buy the said lands for RM6,990,521.00. This sum was inclusive of 1% brokerage commission.

15.Q: Were you involved in the dealings between the Plaintiffs and the 3rd Defendant?

A: Yes, I was.

(c) the additional witness statement of the first appellant (DW1) as seen at pp 229–231 of the appeal record at *Jilid* 2(2) at paras 32–38 must be reproduced:

32.Q: See exhibit IDD2. Can you explain why the voucher has handwritings in 2 different inks (ie. black and blue), different handwritings and parts of it corrected by correction liquid?

A: Initially the voucher only had the words handwritten in blue ink, the payee was Jurukur Alam and the sum was RM900.00 as a single entry in the amount column. These words were written in blue ink by my staff Delia Chan. Based on my earlier conversation with the 2nd Plaintiff, when the voucher was sent to me for checking I asked my staff Delia Chan to make certain corrections and to put in additional details in the voucher. All the corrections and the additions in blue ink were done by Delia Chan. However, the details of the lot numbers were left blank. These lot numbers were filed in black ink by Loh Soon Meng. Later, when I signed this voucher at 2 places and when I signed the cheque, the voucher already had the corrections and additions in blue ink and in blank ink as can be seen on IDD2 now. (Exhibit D2).

33.Q: Who asked for the option fees?

A: The 2nd Plaintiff requested for the option fees. The 2nd Plaintiff wanted the option fees made payable to him and not Jurukur Alam. He said the option had nothing to do with Jurukur Alam. That is why the name of the payee in the voucher had to be corrected.

34.Q: Why did Dynamic Home Pro Sdn Bhd pay RM900.00 for option fees?

A: There were 3 lots of Sungai Ara lands. The 2nd Plaintiff asked for RM300.00 per lot. That is why the amount in the voucher was broken into 3 separate items of RM300.00 each.

35.Q: When did you sign IDD2?

A: I signed it after the corrections and additions were made. I must have signed it on 21.4.2004 or 22.4.2004.

36.Q: When the 3rd Defendant entered into the sale and purchase agreement on 18.5.2004, what was still outstanding before any housing development could be done on the said lands?

A: There were many things that still needed to be settled and cleared. The said lands were not vacant. Lots 289, 290 and 752 had 'agriculture' as its category of land use and further, all the 4 lots were gazetted as hill land. Agriculture land and hill land cannot be used for housing development.

37.Q: What did the 3rd Defendant do about these obstacles?

A: The 3rd Defendant applied for conversion of use from 'agriculture' to 'development' and for excision from hill land.

38.Q: What happened to these applications?

A: By its letter dated 29.7.2005, the Pejabat Tanah Dan Daerah rejected the applications. (Exhibit D5). Despite all our appeals, the status of the said lands are the same until today.

(d) the witness statement of Manoch Sae Goh @ Goh Guan Woon (DW3) as seen at pp 235–236 at paras 1–4 of the appeal record at *Jilid* 2(2) deserved repetition:

1.Soalan (S): Pada tahun 2004 di mana awak bekerja?

Jawapan (J): Pada tahun 2004 saya tidak bekerja untuk mana-mana majikan tetapi saya ada buat kerja sampingan untuk Dynamic Home Pro Sdn Bhd dengan memberi khidmat sekuriti dan membuat lain-lain kerja seperti disuruh oleh pengarahnya Encik Loh Soon Meng. Saya adalah seperti 'runner' untuk Loh Soon Meng.

2.S: Apakah urusan-urusan lain awak dengan Dynamic Home Pro Sdn Bhd?

J: Saya juga terlibat dalam memperkenalkan tanah kepada Loh Soon Meng untuk dibeli oleh Dynamic Home Pro Sdn Bhd.

3.S: Adakah awak pernah berjumpa Khor Teik Khoon iaitu Plaintiff Kedua di pejabat Dynamic Home Pro Sdn Bhd?

J: Saya ada berjumpa dengan Khor Teik Khoon apabila dia datang ke

pejabat-pejabat Dynamic Home Pro Sdn Bhd di Skipton Road dan di Perak Road. Kebanyakannya Khor datang ke pejabat di Perak Road.

4.S: Apakah urusan Khor Teik Khoon apabila beliau datang ke pejabat Dynamic Home Pro Sdn Bhd?

J: Saya kenal dia sebagai seorang broker dan beliau berurus dengan Loh Soon Meng mengenai tanah-tanah untuk dibeli oleh Dynamic Home Pro Sdn Bhd. Khor Teik Khoon ada memperkenalkan diri beliau sebagai broker kepada saya.

(e) in cross-examination, the first respondent (PW1) testified as follows:

(i) that apart from the Sungai Batu lands, the respondents introduced some other pieces of land to Dynamic Home Pro (hereinafter referred to as 'DHP') and Loh Soon Meng;

(ii) the respondents came to know of DHP through Loh Soon Meng and they knew DHP wanted to buy land;

(iii) while the topographical surveys of the Sungai Ara lands were being conducted, the respondents urged DHP to decide quickly about the Sungai Batu lands; and.

(iv) that since the respondents are not legal real estate agents they cannot collect payment for the work which they did.

(f) in re-examination, the first respondent (PW1)) testified that the fees are high because the Sungai Batu lands were 'dirty' and that the respondents had to do a lot of checking and that they had to make sure that the impediments were cleared;

(g) the second respondent (PW2) testified under cross-examination in this way:

(i) that he had dealings with DHP with regard to the Sungai Ara lands and that the Sungai Ara lands were introduced to DHP for them to consider for housing development;

(ii) that he had informed Loh Soon Meng that any delay will affect the sale of the Sungai Batu lands since some of the vendors were not keen to sell;

(iii) that he has the experience in negotiating land deals and in checking the background of the land; and

(iv) that checking the background of the land is part of the broker's responsibility.

(h) the witness statement of Ong Lin Dai (DW6) made reference to exh D2 and at p 242 of the appeal record at *Jilid* 2(2) the following exchange appeared:

> 8.Q: See exhibit D2. Ong Thean Chye produced this exhibit in court. How did he get this exhibit?
>
> A: Exhibit D2 is DHP's payment voucher dated 21.4.2004. Around July 2009, Ong Thean Chye approached me and told me that he has obtained permission from my employers to get some payment vouchers. He was, among other things, looking for vouchers for payments made to Khor Teik Khoon in 2004. After checking the accounts through the DHP accounting system, I found exhibit D2 and also the invoice and voucher at CABD1 pages 4 and 5. I passed these documents to him.

(i) at pp 243–244 of the appeal record at *Jilid* 2(2), the witness statement of Ong Lin Dai (DW6) showed the following exchanges:

> 13.Q: In DHP's accounts, what is the payment in exhibit D2 entered as?
>
> A: Since 2004, it was entered as payment of option fees to Khor Teik Khoon. The relevant accounting records are produced here. (Exhibit D10(A–E).
>
> 14.Q: Look at DHP's payment vouchers to Goh Guan Voon. Who prepared these vouchers?
>
> A: I prepared 3 (out) of the 4 vouchers. My signature is at 'Prepared by'. The other voucher is prepared by Delia Chan. (Exhibit D11(A–C).
>
> 15.Q: Who checked these 4 vouchers?
>
> A: All were checked by Ong Thean Chye, the General Manager at that time.

(j) exhibit D2 at p 363 of the appeal record at *Jilid* 2(3) was a payment voucher in the sum of RM900 in favour of the second respondent and it was dated 21 April 2004 and described as 'being payment for option fees for Sungai Ara land' for Lots 634 and 635 and such payment reflected the system of practice as an estate agent adopted by the second respondent;

(k) while exh D10 (A–E) at pp 389–393 of the appeal record at *Jilid* 2(3) were the general ledgers;

(l) the general ledger at p 389 of the appeal record at Jilid 2(3) was worded in this way:

A

"GENERAL LEDGER

30/04/2004

DYNAMIC HOME PRO SDN BHD PAGE: 1

B

ACCOUNT NO.: 3600/008 PDE(SB)-OPTION FEES

DATE	BATCH	REF.	DESCRIPTION	DEBIT	CREDIT	BALANCE
			BALANCE B/F			0.00
30/04/2004	41	324422	SG ARA LOT 634,635 (KHOR TEIK KHOON)	900.00		900.00
				900.00	0.00	900.00

C

"

D and it made reference to Sungai Ara Lots 634, 635 bearing the name of the second respondent; and

(m) exhibits D11 (A–C) at pp 394–395 of the appeal record at *Jilid* 2(3) were the payment vouchers and exhs D11A, D11B and D11C of the same appeal record were payment vouchers from DHP to Goh Guan Woon for the sum of RM350 each for consultancy services for February 2004, March 2004 and April 2004.

E

[35] In our judgment, the evidence of system as demonstrated clearly showed that the respondents were running an estate agency practice without a valid authority to practice under the Valuers, Appraisers and Estate Agents Act 1981.

F

THE SAID DOCUMENT IS A SHAM DOCUMENT

G

[36] The respondents entire claim was based on the said document dated 12 May 2004. It was, pure and simple, an agreement for land brokerage commission and/or real estate agent's commission. The scale of fees as set out in r 48 of the Valuers, Appraisers and Estate Agents Rules 1986 deserves mention. It is worded as follows:

H

SCALE OF FEES —

48

I

(a) The scale of fees to be charged by the registered valuers, appraisers and estate agents for professional advice or services rendered shall not be more than those prescribed in the Seventh Schedule.

(b) The values shown in the Seventh Schedule shall be deemed to be the total amount undertaken under one specific instruction.

[37] And according to the Seventh Schedule to r 48 of the Valuers, Appraisers and Estate Agents Rules 1986, for sale and purchase transactions a registered real estate agent can claim a maximum estate agency fees of 3% on the first RM100,000 and 2% on the residue over RM100,000. But the consideration as stated in the said document showed a rather large percentage of about 80% as consideration. In other words, the respondents land brokerage commissions under the said document came up to 80% of the sale and purchase price.

[38] Prima facie, the said document must be construed as ridiculous and/or nonsensical. What is eminently clear is this. If a registered real estate agent can only get a maximum of 3% commission, it is preposterous that an unlicensed agent like both the respondents can secure a commission up to 80%.

[39] The appellant's defence was quite simple. That the said document was a sham agreement or a sham document.

[40] The sum of RM3,106,876 as stated in the statement of defence and was payable under the said document was actually part of the sale and purchase price payable to the vendors. It was 'under counter money', so to speak, that the respondents were supposed to pay to the vendors but which the respondents are now claiming as their own. Surely the court is not expected to support an improper commercial arrangement!

[41] Ong Thean Chye, the first appellant (DW1), explained the purpose and nature of the said document in his witness statement. At paras 16–23 of his witness statement, he had this to say (see pp 223–225 of the appeal record at *Jilid* 2(2):

16.Q: Look at the Agreed Bundle (Part II) page 10. Can you explain what this document is?

A: The Plaintiffs explained to, and advised, the 3rd Defendant that as there were several vendors and because of problems between the vendors, the payment to the vendors had to be split into two parts. One part would be through a proper sale and purchase agreement and the other part would be paid to the vendors through the Plaintiffs. The Plaintiffs convinced the 3rd Defendant that all the payments to the Plaintiffs would actually be paid to the vendors except for 1% brokerage commission payable to the Plaintiffs. This means that a total of RM6,990,521.00 was to be paid to the vendors except for 1% brokerage commission. The letter at page 10 is to cover the payment to the vendors through the Plaintiffs and the Plaintiffs' brokerage commission.

17.Q: Who issued the letter at Agreed Bundle (Part II) page 10?

A: The letter was given by the 3rd Defendant. I signed the letter as a director of the 3rd Defendant. This letter was not given personally by me or the 2nd Defendant.

18.Q Did the 3rd Defendant have any hesitation or reservations in giving the letter at Agreed Bundle (Part II) page 10?

A: Yes, we had a lot of reservations. The amount involved was very big. We were doubtful whether the monies would actually be paid to the vendors. We were doubtful about the legality of the letter. We did not want to be involved in any payment of 'under counter' money.

19.Q Why then did the 3rd Defendant give the letter at Agreed Bundle (Part II) page 10?

A: Firstly, the Plaintiffs, especially the 2nd Plaintiff, told us that without this letter the sale cannot be concluded. The 2nd Plaintiff said the vendors were not agreeable to the entire purchase price being covered under the sale and purchase agreement. Secondly, the Plaintiffs said they were experienced in these types of matters and that there was no problems in giving such a letter. They said there was no problem in describing part of the purchase price as 'professional fees and charges' because they were also giving professional advice and services to us. The Plaintiffs also advised that in order to avoid any allegation of 'under counter' payment, the payment will be provided for in the form of an agreement with the Plaintiffs for payment of their professional estate agents fees and charges and that they will forward the money paid to the vendors. The Plaintiffs assured us that they could be trusted as they were professionals. The 3rd Defendant was convinced by the Plaintiffs and agreed to the vendors' purported condition of a separate payment. The 2nd Plaintiff claimed he was an expert in these matters.

20.Q Do you know why the payment under the letter is made in stages?

A: As the letter was actually for payment of part of the purchase price for the said lands, the payment exactly followed the stages for payment under the sale and purchase agreement — see Agreed Bundle (Part II) page 21.

21.Q Did you or anyone from the 3rd Defendant meet the vendors?

A: No. All negotiations with the vendors was done by the Plaintiffs. We did not have any direct contact with the vendors.

22.Q What did the Plaintiffs tell you about the negotiations with the vendors?

A: The Plaintiffs said that they had to deal with several vendors who were not all on good terms. Some of the vendors were not keen to sell. So they had to do a lot of negotiations to get them to agree to sell the lands at the total price of RM6,990,521.00.

23.Q Is the contents of the letter at Agreed Bundle (Part II) page 10 true?

A: No, it is not true. It is a sham document. Except for 1% brokerage commission, the rest of the money mentioned there is to be paid to the vendors. Further, it is ridiculous that the estate agents' professional fees and charges are 79.99% of the purchase price of the property sold.

[42] Briefly, Ong Thean Chye (DW1) explained that the total purchase price to be paid to the vendors was to be split into two. That part of the payment directly to the vendors was covered under the said agreement whereas the said

document was to cover the payment to the vendors through the respondents and the respondents' 1% brokerage commission.

[43] It is our judgment that a brokerage commission of 1% makes commercial and business sense and it is the norm in the industry.

[44] There was an inadequate judicial appreciation of the evidence by the learned High Court judge. His Lordship failed to appreciate that the respondents themselves in their evidence admitted that the sum of RM3,106,876 under the said document was part and parcel of the sale and purchase price. The first respondent testified at pp 62–63 of the appeal record at *Jilid* 2(1) in this way:

Q37 The defendants were reluctant to sign page 10 of CABD '2' because they did not want to be accused of making under counter payments.

A - I don't know of this.

Q38 You and 2nd plaintiff especially 2nd plaintiff told them that they could do so for several reasons, firstly they have done such agreements in the past without problems, (secondly) there are no problems of under counter payments because the money here is for professional fees and charges, thirdly because you and 2nd plaintiff would ensure the money is paid to the vendors?

A - No.

Q39 But only after assurances given by you and 2nd plaintiff, the defendants signed page 10 CABD '2'?

A - Yes.

[45] Continuing towards the end of p 63 of the appeal record at *Jilid* 2(1), the first respondent had this to say:

Q40 Refer to CABD '2', page 10, and the manner of payment in paragraph 2, para 2(i) & (ii) of page 21 of CABD '2', do you agree the manner of payment in both documents are the same?

A - Yes.

[46] Under re-examination, the first respondent had this to say at p 75 of the appeal record at *Jilid* 2(1):

(Q64 Who fixed the professional fees and the purchase price?

(A - I and 2nd plaintiff fixed the price.

[47] Under cross-examination, the second respondent testified as follows (see p 90 of the appeal record at *Jilid* 2(1)):

> Q38 After TMIV agreed to buy the land at this price, you told them that the vendors imposed a condition that the price must be split into 2 one under a formal Sale and Purchase between the vendors and the purchasers and another under a letter for payment to be made to you and the 1st plaintiff?
>
> A - Yes.

[48] Continuing with his cross-examination, this was what the second respondent testified at p 91 of the appeal record at *Jilid* 2(1):

> Q43 The defendants only signed after you had given them several assurances firstly that you had done this sort of payment before secondly no problem of under counter money because it is being classified as professional fees and charges and thirdly you are a professional person and you would make sure the vendors are paid?
>
> A - I can't remember if I had given them such assurances.

[49] It cannot be denied that the evidence of the second respondent under cross-examination at p 10 of the appeal record at *Jilid* 2(1) was most telling. The second respondent agreed that the purchase price was to be split into two. And the first respondent himself admitted at p 75 of the appeal record at *Jilid* 2(1) that the respondents themselves who had fixed the professional fees and the purchase price.

[50] The learned High Court judge also failed to consider an earlier sworn affidavit of the respondents affirmed on 23 August 2005 and there they admitted that the balance sum of RM2,485,500 was part of the purchase price payable to the vendors. At p 398 of the appeal record at *Jilid* 2(3), this was what the respondents affirmed in its original Malay language text:

> 8
>
> (a) Defendan-Defendan telah menerimapakai dan mengakui keseluruhannya dengan bayaran 20%. Defendan-Defendan tidak boleh memakai kontrak ini dan menerimanya dan pada masa yang sama menafikannya juga (blow hot and cold or approbate and reprobate).
>
> (b) Bakinya adalah sebanyak RM2,796,188.40. Wang berjumlah RM2,485,500.80 perlu dibayar kepada Penjual.

[51] There was failure on the part of the learned High Court judge to appreciate the evidence of Tan Hiang Joo (DW2) and Yiew Voon Jin (DW4) in its correct perspectives. Both these two gentlemen are advocates and solicitors

and their evidence shed new light to the case. Tan Hiang Joo (DW2) in his witness statement at p 234 of the appeal record at *Jilid* 2(2) at para 6 averred as follows:

6.

Q: What did the 1st Defendant tell about the payments to the Plaintiffs?

A: The 1st Defendant told me that this was payment of part of the purchase price to the vendors being made through the Plaintiffs.

[52] While Yiew Voon Jin (DW4) in his witness statement at paras 8–12 of the appeal record at pp 239–240 at *Jilid* 2(2) stated as follows:

8. Q What other instructions or information were you given about the purchase price for the properties concerned?

A: When I was in the midst of finalising the agreement, I was informed that apart from the sum of RM3,883,645.00 under the sale and purchase agreement, the purchaser has to pay to the vendors another sum of RM3,106,876.00 as part of the purchase price but this sum will be paid to Tiew Choy Chai and Khor Teik Khoon under a separate letter to them otherwise some of the co-vendors would not sell the land to my client.

9. Q What instructions did you receive on the payment of RM3,106,876.00 to Tiew Choy Chai and Khor Teik Khoon?

A: I was asked to prepare a letter or agreement for the payment to Tiew Choy Chai and Khor Teik Khoon.

10. Q What was your response?

A: I told my client that I do not want to have anything to do with any payment of the purchase price under a separate letter or agreement to Tiew Choy Chai and Khor Teik Khoon. I told my client that as far as I was concerned my firm will only act upon, be involved in and handle matters covered under the sale and purchase agreement.

11. Q Why did you not want to prepare a separate letter or agreement for the payments to Tiew Choy Chai and Khor Teik Khoon?

A: In my view, this was 'under counter' payment and is illegal and an evasion of stamp duty and tax and most importantly, Tiew Choy Chai and Khor Teik Khoon were not the vendors or the owners of the properties concerned.

12. Q What are your comments on the letter at CABD(II) page 10?

A: From the outset in this matter, I did not prepare the letter and I do not want to get involved.

[53] These two advocates and solicitors testified that the payments to the respondents were payment of part of the purchase price to the vendors being

made through the respondents. This damning piece of evidence was entirely overlooked by the learned High Court judge.

[54] In his oral evidence in court, Tan Hiang Joo ('DW2') confirmed that the payments under the said document were extra payments of the purchase price to be paid through the respondents (see the appeal record at *Jilid* 2(1) at pp 110D and 115 A–D).

[55] Likewise Yiew Voon Jin ('DW4') in his oral evidence testified that the sum of RM3,106,876 was part of the purchase price. In its original text, this was what Yiew Voon Jin (DW4) testified (see the appeal record at *Jilid* 2(1) at pp 162D):

Q69 Put the sum ie RM3,106,867 is not part of the purchase price?

A - I disagree.

[56] Again, at p 163A–C of the appeal record at *jilid* 2(1), Yiew Voon Jin (DW4) testified as follows:

Q71 There was no mention by anyone that this was under the counter money when you took instructions?

A - I was told and instructed by Loh Soon Meng that if this amount is not paid to the co-vendors some of the co-vendors would not sign the agreement.

Q72 Only he told you that?

A - He and Mr Ong i.e. defendant 1.

Q73 Said in each others presence?

A - I can't remember if it was in each others presence, but I told them I do not want to get involved in this separate arrangement or agreement because it amounts to under counter money and it was an evasion of stamp duty and taxes. I also told them I don't want to be hauled up by the relevant authorities as abetting them.

[57] Thus, the scenario was like this. That Yiew Voon Jin (DW4) was the solicitor who handled the conveyancing. DW4 did not want to be involved in the under counter payment to be paid based on the said document. The third appellant had to engage Tan Hiang Joo (DW2) to disburse the payment under the said document and DW2 acknowledged that this was part of the purchase price.

[58] It must be borne in mind that Yiew Voon Jin (DW4) gave evidence as an independent witness and he categorically said that the payment under the said document was an 'under counter payment'. It was rather unfortunate that this piece of evidence was completely ignored by the learned High Court judge.

[59] We observed that both DW2 and DW4 remained firm when they were being cross-examined and re-examined. In our judgment, there was absolutely no reason for DW2 and DW4 to lie and not tell the truth. In our judgment, the evidence of DW2 and DW4 supported and corroborated the evidence of the first appellant (DW1).

[60] The value of the oral evidence of a witness under oath cannot be rejected outright without grounds. Otherwise it must be weighed in a balance as against the other available evidence. When you talk of 'direct testimony', you are referring to the evidence of a witness who has perceived a fact in issue and he comes to court to testify. He perceived a fact to be a relevant fact or a collateral fact with one of his five senses. To put it differently, it is a testimony relating to facts of which the witness has or claims to have personal or first hand knowledge.

[61] According to the first appellant, the respondents are now claiming the entire sum of RM3,106,876 as their own and the third appellant stopped payments under the said document once the third appellant knew that the payments were not forwarded to the vendors. The witness statement of the first appellant at pp 226–227 of the appeal record at *Jilid* 2(2) supported these assertions and they will now be reproduced:

26. Q: What happened after that?

A: Shortly after the payment of the 2nd 10% (see Agreed Bundle (Part II) pages 50–53), I heard news or complaints that the vendors were cheated or not paid what was due to them. I personally telephoned lawyer Ms Goh Siew Kin of Messrs. Yeap Siew Kien & Co (ie. the lawyers for the vendors) and she confirmed that the vendors did not receive any payments apart from the payments under the sale and purchase agreement. I was shocked.

27. Q: What did you do next?

A: I confronted the Plaintiffs about why the vendors were not paid the monies under the letter at Agreed Bundle (Part II) page 10. I was again shocked when the Plaintiffs told me that all the monies/payments under this letter were theirs as 'professional fees and charges' for their work, services and advice as brokers. They said they did a lot of work and all the monies/payments belonged to them. This was nearly 45% of the total payment.

28. Q: What did you or the 3rd Defendant do next?

A: We then obtained legal advice and found out that without being licensed as estate agents, the Plaintiffs cannot collect fees or charges for brokerage services or advice. I found out that the Plaintiffs have been illegally practising as land brokers or estate agents. The Plaintiffs clearly acted as estate agents in the sale of the said lands between the vendors and the 3rd Defendant. They claimed they were professionals or experts in land brokerage matters and they wanted professional fees and charges.

[62] In regard to the allegation that the first and the second appellants absconded to Singapore, this was the response of the first appellant (see p 227 of the appeal record at *Jilid* 2(2)):

29

Q: Around early August 2005, did you and your wife abscond to Singapore to avoid paying any judgment sum to the Plaintiffs?

A: This is nonsensical. We went to Singapore on 3.8.2005 and came back to Penang on 5.8.2005. The 3rd Defendant had monies in fixed deposit accounts in Malaysia. I refer to Agreed Bundle (Part II) pages 19-20 and 28-55 and Disagreed Bundle pages 1–6 (Exhibit D4(A-F)).

[63] In refusing to pay the respondents under the said document, the first appellant advanced this reason in his witness statement at p 227 of the appeal record at *Jilid* 2(2):

30

Q: Why is the 3rd Defendant not paying to the Plaintiffs the sums under the letter at Agreed Bundle (Part II) page 10?

A: Firstly, this is a sham letter. Secondly, since the Plaintiffs are not licensed brokers or estate agents, they have illegally practised as broker or estate agents. The Plaintiffs are claiming an exhorbitant amount of money for their purported brokerage services.

[64] It is our judgment that the said document is a sham document. The learned High Court judge misdirected himself when he said (at p 21 of the appeal record at *Jilid* 1):

> The letter was stamped with payment of RM10/- stamp fees leading me to conclude that the parties were serious in their intention to be bound by the terms of the letter.

[65] We are of the view that the mere act of stamping does not change the character of any document or agreement. We categorically say that an illegal document or agreement will remain illegal despite it being stamped (*Pemungut Duti Setem v BASF Services (Malaysia) Sdn Bhd* [2009] 5 MLJ 348; [2010] 4 CLJ 556).

[66] Paragraph 16 of the statement of defence invoked s 24 of the Contracts Act 1950. That section enacts as follows:

> What considerations and objects are lawful, and what not
>
> 24 The consideration or object of an agreement is lawful, unless —
>
> (a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[67] Section 24(a) and (b) of the Contracts Act 1950 relate to contracts that are regarded as illegal under the common law. When you invoke s 24(a) and (b) of the Contracts Act 1950, you are saying that the contract is illegal. In short, if a contract is caught under s 24(a) or s 24(b) of the Contracts Act 1950, that contract is said to be void. See the decision of Peh Swee Chin FCJ in *Sabahbumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 (FC).

[68] Our courts will not enforce contracts which are tainted with illegality. But the factual situations giving rise to judicial intervention on the ground of illegality are so varied that they defy general or easy classification. Bingham LJ in *Saunders v Edwards* [1987] 2 All ER 651, at pp 665–666 showcased the attitude of the courts to claims of illegality in these trenchant terms:

Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss or how disproportionate his loss to the unlawfulness of his conduct.

On the whole the courts have tended to adopt a pragmatic approach to these problems, seeking where possible to see that genuine wrongs are righted so long as the court does not thereby promote or countenance a nefarious object or bargain which it is bound to condemn.

[69] Courts too will not lend its aid to enforce pretended obligations. Only real obligations will be enforced (*Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257 (FC); *Seascope Sdn Bhd v Syed Izhar bin Syed Salleh* [2006] 3 MLJ 756, (HC); *Lee Pooi Chun v Lee Kah Gee* [1971] 2 MLJ 67 (FC); and *Palaniappa Chettiar v Arunasalam Chettiar* [1962] MLJ 143 (PC)).

[70] The appellants argued that there was absolutely no basis to pay RM3,106,876 as 'professional fees and charges' when both the respondents

were unlicensed under the Valuers, Appraisers and Estate Agents Act 1981 and when the sale and purchase price of the said lands was RM3,883,645. It was also argued by the appellants that the amount was ridiculously high and it was purely 'under counter' money. We endorsed such arguments.

[71] Indeed the evidence of the second respondent (PW2) during cross-examination showed that the respondents did very little work. Only standard real estate agent and land broker works were performed. There was nothing to shout about. Despite claiming for the sum of RM3,106,876, the second respondent (PW2) seemed oblivious as to what he had done. He knew very little about the said lands which he sold. In the final analysis, the said lands were not even suitable for housing development. The letter from the land office at Balik Pulau, Pulau Pinang dated 29 July 2005 marked as exh 'D5' as seen at p 371 of the appeal record at *Jilid* 2(3) explained the current position of the said lands:

> Tuan,
>
> (A) PERMOHONAN MENUKAR SYARAT KEGUNAAN TANAH DARIPADA 'PERTANIAN' KEPADA 'BANGUNAN' KE ATAS LOT-LOT 289, 290 DAN 752, MUKIM 11, DAERAH BARAT DAYA, SELUAS 6.1184 HEKTAR (15.1186 EKAR) DAN
>
> (B) MENGELUARKAN LOT-LOT 289, 290, 191 DAN 752, MUKIM 11, DAERAH BARAT DAYA DARI KAWASAN TANAH BUKIT YANG DIWARTAKAN SELUAS 7.2159 HEKTAR (17.8305 EKAR) UNTUK TUJUAN PERUMAHAN DARIPADA TMI VENTURES (M) SDN. BHD.
>
> Dengan hormatnya saya merujuk kepada perkara di atas.
>
> 2. Dimaklumkan bahawa Pihak Berkuasa Negeri di mesyuaratnya pada 6 Julai 2005 dan disahkan pada 13 Julai 2005 telah menolak permohonan tersebut.

[72] While sitting on the High Court bench, Dato' Abdul Malik Ishak had occasion to ventilate his views about illegality under the Contracts Act 1950. This was what he said in the case of *ABDA Airfreight Sdn Bhd v Sistem Penerbangan Malaysia Bhd* [2001] 3 MLJ 641, at pp 685–688 of the report:

> Now, in so far as illegality is concerned, s 24(e)of the Contracts Act 1950 must be referred to. That provision is worded widely and throws its net wider. It refers to a contract whose consideration or object is immoral or opposed to public policy and it extends to statutory illegality. Both s 24(a) and s 24(b) of the Contracts Act 1950 would definitely trigger the issue of Illegality quite freely (*Koh Kim Chai v Asia Commercial Banking Corp Ltd* [1981] 1 MLJ 196 and *Tunku Kamariah Aminah Maimunah Iskandariah bte Sultan Iskandar v Dato James Ling Beng King* [1989] 2 MLJ 249 at p 252). I would even venture to say that s 24(e) of the Contracts Act 1950 would even extend to those category of contracts which would be illegal under the common law. Local authorities that considered s 24 of the Contracts Act 1950 are quite plentiful. I will name a few of them. For starters, reference should be made

to the case of *Ng Siew San v Menaka* [1973] 2 MLJ 154, which was affirmed in *Menaka v Lum Kum Chum* [1977] 1 MLJ 91 (PC), where the court held that a breach of the Moneylenders Ordinance fell within the purview of s 24(a) of the Contracts Act 1950. This was followed by the case of *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 at p 22, where it was held that a breach of conditions under the National Land Code fell within the ambit and purview of s 24(b) of the Contracts Act 1950. Next, it would be the case of *Hopewell Construction Co Ltd v Eastern & Oriental Hotel (1951) Sdn Bhd* [1988] 2 MLJ 621, where the court considered s 24(b) of the Contracts Act 1950 in the context of an alleged contravention of the Companies Act 1965. This would be followed by the case of *Amalgamated Steel Mills Bhd v Ingeback (Malaysia) Sdn Bhd* [1990] 2 MLJ 374, where the court considered the contravention of the Stamp Ordinance in the context of s 24(a) of the Contracts Act 1950 and the court also considered s 24(e) of the Contracts Act 1950 in relation to the common law rule in regard to the defrauding of the revenue. Next, it would be the case of *Marble Terrazzo Industries Sdn Bhd v Anggaran Enterprise Sdn Bhd & Ors* [1991] 1 MLJ 253, where the court held that the contravention of the National Land Code fell within the scope of s 24(a) of the Contracts Act 1950. Finally, reference should also be made to the case of *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281, where the court held that contravention of the tax law came within the scope of s 24(b) of the Contracts Act 1950. The great judge Hashim Yeop A Sani CJ (Malaya) in the course of delivering the judgment in the case of *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 observed that at p 362:

Paragraphs (a), (b) and (e) of s 24 of the Contracts Act 1950 should be read disjunctively. Section 24 of the Contracts Act 1950 is explicit and that if an agreement is forbidden by law or prohibited by law or of such a nature that it would defeat the law, that agreement is unlawful and void. If the agreement is prohibited by law or forbidden by law or of such a nature that it would defeat the law then the question of public policy does not arise at all. The question of public policy arises only in para (e) where the court considers an agreement to be immoral or otherwise opposed to public policy.

To be valid, a contract must be legal. Legality gives validity to a contract. If a contract is designed to do something illegal, that contract can be said to be invalid and unenforceable. Whereas void contracts are not invalid: pure and simple, they are simply unenforceable at law.

The case of *Re Mahmoud and Ispahani* [1921] 2 KB 716 is a classic example of an illegal contract. Briefly, the facts in that case may be stated in this way. An order that was made on 19 June 1919 under the defence of the Realm Regulations (UK) provided that 'a person shall not … buy or otherwise deal in, …. linseed oil …. except under licence.' The plaintiff, who had a seller's licence, contracted to sell a quantity of linseed oil to the defendant in the mistaken belief that he had a buyer's licence. The defendant later refused to accept delivery and, when sued, protested that the contract was prohibited by the order and was, therefore, invalid and unenforceable. It was held that the order, in clearly and expressly prohibiting unlicensed contracts of sale, expressly prohibited the contract involved in this dispute. Consequently, it was held that the contract was illegal and unenforceable.

A The court, too, held that neither party had acquired any rights under it and the court ruled that the seller's action must fail.

However, not all statutes are as clearly worded as the order in *Re Mahmoud and Ispahani*. Yet another case would be the case of *Cope v Rowlands* (1836) 150 ER 707; 2 M & W 149;. That was a case where a United Kingdom statute provided that
B brokers in the city of London had to be licensed or be fined to the tune of 25 pounds. The plaintiff, an unlicensed broker, performed work for the defendant and sued for his unpaid fee. The defendant took the point and argued that the contract was illegal and unenforceable because the statute, in penalising the behaviour, was really intended to prevent unlicensed broking contracts and, therefore, impliedly made
C them illegal. It was held that the fee was not recoverable. The legislation was aimed at protecting the public by ensuring that only those who had passed through the licensing process could act as financial intermediaries. Consequently, the court held that broking contracts negotiated by unlicensed persons were impliedly prohibited. Parke B at p 159 and pp 710–711 said:

D The legislature had in view … the security of the public in those important transactions which are negotiated by brokers. The clause … must be taken … to imply a prohibition of all unadmitted persons to act as brokers, and consequently to prohibit by necessary inference all contracts which such persons make… for so acting.

E Both these two cases, *Re Mahmoud and Ispahani* and *Cope v Rowlands*, are classic examples of contracts that were illegal as formed. In both these two cases, the contracts by themselves were expressly or impliedly forbidden. For this reason, the contracts were not enforceable.'

F I pause here for a moment. I wish to make the following observations:

(1) The court will always look to the substance and not the form of the transaction in ascertaining whether or not there has been an express or an implied prohibition of the contract (see *Siow Kwang Joon v Asia Commercial Finance (M) Bhd* [1996] 3 MLJ 641 at p 642 for the distinction between express and implied
G prohibition; see also the following cases for this simple proposition of the law: *Sundang Timber Co Sdn Bhd v Kinabatangan Development Co Sdn Bhd* [1977] 2 MLJ 200, *Tong Kheng Bros (M) Sdn Bhd v Anuarul Aini bin Mohd Perai & Ors* [1990] 2 CLJ 715 and *Idris bin Haji Mohamed Amin v Ng Ah Siew* [1935] MLJ 257). The same approach should be adopted when one is dealing with the
H question of illegality at common law. In the past, judges would not tolerate any contract that was injurious to society. Judges used vague and fanciful words to describe the term 'injury to society' and, for this purpose, I need to cite a few examples:

(a) usage of the words 'to stipulate for iniquity' (per Wilmot LCJ in *Collins v*
I *Blantern* (1767) 2 Wils KB 341 at p 350);

(b) usage of the phrase 'contrary to the general policy of the law' (per Aston J in *Lowe v Peers* (1768) 4 Burr 2225 at p 2233);

(c) usage of the language 'against the public good' (per Wilmot LCJ in *Collins v Blantern*);

(d) usage of the phrase 'contra bonos mores' (per Lord Kenyon in *Girardy v Richardson* (1793) 1 Esp 13); and

(e) employing the words like 'ex turpi causa' (per Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341 at p 343).

(2) The list of illegal contracts can never be closed. It includes, inter alia, contracts to commit crimes, torts or fraud, contracts to defraud the revenue, contracts affecting public safety or the administration of justice or the incorruptibility of public officers, contracts in regard to restraint of trade and contracts that are sexually immoral.

(3) The consequences of an illegal contract may be stated as follows.

(a) If in its inception the contract is illegal, then neither party can assert that he did not intend to break the law. Where both parties have expressly and clearly agreed to do something which is prohibited at common law, then the contract between them would be struck down for illegality. The same would also be true in a situation where both the parties have agreed to do something that is expressly or implicitly forbidden by statute (*Re Mahmoud and Ispahani*). Now, in both these two situations which I have enumerated, the contracts are intrinsically and inevitably illegal and no allowances would be made for any innocence. The rationale is very simple. It is this: that the contract is unlawful in its formation.

(b) If the contract is ex facie lawful, but both parties intend to exploit it for an illegal purpose, then the contract is illegal in its inception despite the appearance of it being innocent. This would be the situation where both parties intend to accomplish an unlawful end and, consequently, both would be without remedy. A good example would be the case of letting a flat where there is a common intention to use it for prostitution. Another example can be seen in the case of *Pearce v Brooks* (1866) LR 1 Ex 213, where the plaintiff agreed to supply the defendant with a miniature brougham coach which he knew that she intended to use for purposes of prostitution. The coach was not paid for and the plaintiff sued. It was held that the plaintiff failed in his claim because he was aware that the carriage would be used for immoral purposes and, for that reason, the courts refused to assist him to recover the price of the coach.

(c) If the contract is lawful in its inception, but somehow only one party alone intends to exploit it for an illegal purpose, then the law takes the view that the innocent party need not be adversely affected by the guilty intention of the other (*Oom v Bruce* (1810) 12 East 225, *Clay v Yates* (1856) 1 H & N 73 at p 80, *Pearce v Brooks* (1866) LR 1 Exch 213 at pp 217 and 221, *Alexander v Rayson* [1936] 1 KB 169 at p 182 and *Re Trepca Mines Ltd (No 2)* [1963] Ch 199 at pp 220–221). Now, whether the innocent party is really innocent or guilty would be dependent upon whether he is implicated in the illegality (*Scott v Brown, Doering, McNab & Co Ltd* [1892] 2 QB 724 at p 728). To be precise, the question to pose would be whether the innocent party has participated in furtherance of the illegal activity (*Re Trepca Mines Ltd (No 2), JM Allan (Mercandising) Ltd v Cloke* [1963] 2 QB 340 at p 348 and *Belmont Finance Corp Ltd v*

Williams Furniture Ltd [1979] Ch 250; [1979] 1 All ER 118). Allow me to give an example. For instance, if Alan lets a flat to Elizabeth, a woman whom Alan knows to be a prostitute, then the very contract will be unlawful if Alan knows that Elizabeth's intention is to use the premises for prostitution. However, if Alan is only aware of Elizabeth's mode of life, it would be reasonable for Alan to infer that the purpose of Elizabeth renting the flat is merely to stay there and not to carry out an immoral activity, after all, even a prostitute needs to stay in a house. Pure and simple, under this head, the contract is lawful in its inception but is later illegally performed.

[73] As a sham document it was entirely unenforceable. There was no basis for the respondents to claim 'professional fees and charges' of any kind whatsoever.

THE LOCUS STANDI ISSUE

[74] As a sham document, the respondents have no locus standi to seek the prayers they sought in their statement of claim.

[75] The effect of the locus standi rules in any legal system is to exclude some people from obtaining the assistance of the courts. Thus, wherever someone is excluded by reason of the locus standi rules, then the law regards it as preferable that an illegality should continue and the person should be excluded from gaining access to the courts.

LIFTING THE VEIL OF INCORPORATION

[76] The respondents' statement of claim did not allude to the need to lift the veil of incorporation of the third appellant and we are reluctant to do so. The parties must be bound by their pleadings.

[77] As a general rule, the courts have disregarded the independent legal entity rule and drawn aside the corporate veil. The courts can and do pull aside the persona and look to see who is behind by using a process commonly known and referred to as 'lifting the veil of incorporation'. It is by this process that those who are responsible may be held personally liable for the acts or purported acts of the company. But in the instant appeal, it was not pleaded in the statement of claim that the veil of incorporation of the third appellant should be lifted.

[78] It must be borne in mind that incorporation of a company casts a veil over the true persons who control the company. And the law will not permit the

veil to be penetrated except in exceptional situations. Generally speaking, the courts will respect the company's integrity and will decline to lift the veil of incorporation.

[79] It is our judgment, that the only justification for lifting the veil of incorporation would be where the company is not a separate entity. But, in the instant appeal, this point was not pleaded by the respondents in their statement of claim. And to compound the matter further, the third appellant is a separate and distinct legal entity from the first and the second appellants.

CONCLUSION

[80] For the reasons adumbrated above, we unanimously allowed the appeal with costs of RM2,000. We accordingly set aside the decision of the learned High Court judge. The deposit to be refunded to the appellants.

Appeal allowed with costs.

Reported by Kanesh Sundrum